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8 UNITED STATES DISTRICT COURT
9 WESTERN DISTRICT OF WASHINGTON
10 AT TACOMA

11 TERI MORRIS, an individual,

12 Plaintiff,

13 v.

14 CONIFER HEALTH SOLUTIONS LLC, a
15 Texas Corporation; and DOES 1 through
16 10,

Defendants.

CASE NO. 20-cv-5181-RJB

ORDER GRANTING MOTION TO
COMPEL ARBITRATION

17 THIS MATTER comes before the Court on Defendant Conifer Health Solutions, LLC's¹
18 Motion to Dismiss and Compel Arbitration ("Motion"). Dkt. 6. The Court has considered the
19 Motion, documents filed in support of and in opposition thereto, and the remainder of the record
20 herein. For the reasons set forth below, the Court should grant the Motion.

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23 ¹ The Motion provides that "Conifer Health Solutions, LLC is incorrectly named as defendant in this action. The
24 correct employing entity is Conifer Revenue Cycle Solutions, LLC." Dkt. 6, at 2. This order refers to the defendant
as "Conifer."

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I. FACTUAL BACKGROUND

This is a racial discrimination, harassment, and wrongful termination case. Dkt. 1-1. Plaintiff began working for Conifer in approximately June 2015. Dkt. 1-1, at 5. On May 23, 2015, Conifer provided Plaintiff with the Open Door and Fair Treatment Process ("FTP"), which, among other things, provides for final and binding arbitration over issues covered by the FTP. Dkt. 7-1, at 5. The FTP provides a five-step procedural system "that an employee generally must follow to obtain resolution of a problem, concern or dispute:" Step 1 consists of an informal discussion with a supervisor; Step 2 is discussion with a Department head; Step 3 is obtaining a written response from Facility Administration; Step 4 is a FTP Committee decision; and Step 5 is final and binding arbitration . Dkt. 7-1, at 2-3.

The FTP provides terms for the arbitration process, in part, as follows:

The arbitration will be administered by the American Arbitration Association ("AAA"). The Company and the employee will share the cost of the AAA's filing fee and the arbitrator's fees and costs, but the employee's share of such costs shall not exceed an amount equal to one day's pay (for exempt employees) or eight times the employee's hourly rate (for non-exempt employee) or the local filing fee, whichever is less. The employee and the Company will be responsible for the fees and costs of their own legal counsel, if any, and for their own other expenses and costs, such as costs associated with witnesses or obtaining copies of hearing transcripts.

Exclusions and Restrictions: Certain issues may not be submitted for review (or exclusive review) under the FTP ("Excluded Issues") or may be subject to special restrictions ("Restricted Issues").

Excluded Issues: Workers' Compensation Claims, any claim involving the construction or application of a benefit plan covered by ERISA, and claims for unemployment benefits are excluded from the FTP. In addition are any non-waivable statutory claims, which may include claims within the jurisdiction of the National Labor Relations Board, wage claims within the jurisdiction of a local or state labor

1 commissioner, or administrative agency charges before the
2 Equal Employment Opportunity Commission or similar local
3 or state agencies, are not subject to exclusive review under the
4 FTP. This means that employees may file such non-waivable
5 statutory claims with the appropriate agency that has
6 jurisdiction over them if they wish, regardless of whether they
7 decide to use the FTP to resolve them. However, if such
8 agency completes its processing of an employee's claim and
9 the employee decides to pursue further remedies on such
10 claims in a civil action against the Company, the employee
11 must use the FTP (although Steps 1 through 4 may be
12 skipped). In addition, the FTP does not apply to employees
13 covered by a collective bargaining agreement, unless
14 otherwise agreed to by such employees.

Restricted Issues: Sexual harassment Complaints. Due to the
sensitive nature of claims of sexual harassment,
employees are not required to use Step 1 of the FTP to raise
sexual harassment claims if they do not wish to do so.
Instead, they should follow the steps in the Company's policy
prohibiting sexual or other unlawful harassment. If the
employee is not satisfied with the Company's response to a
claim for sexual harassment, then the employee must use the
FTP to resolve the claim of dispute.

....

Applicable Law and Procedural Rules: The Federal Arbitration
Act, 9 U.S.C. § 1, et seq., will govern arbitrations under the
FTP. The applicable Employment Dispute Resolution rules of the
AAA will govern the procedures to be used in such
arbitrations, unless the parties have agreed otherwise.

....

Limitations Periods: Any request for arbitration under the FTP
must be made within one year after the event giving rise to the
dispute. If the claim was submitted to a federal, state or local
agency, then a request for arbitration of that claim must be made
within 90 days of the receipt of the agency's decision. However, if
a longer limitations period is provided by a statute governing
the claim, then the claim will be subject to the longer limitations
period provided by the statute.

....

1 Confidentiality: All statements and information made or revealed
2 during the FTP are confidential, and neither the employee nor
3 the Company may reveal any such statements or information,
 except on a "need to know" basis or a permitted or required by
 law.

4 Dkt. 7-1, at 5–6.

5 On May 23, 2015, Plaintiff signed and dated a Handbook and Fair Treatment Process
6 Acknowledgement form, which provides, in part, as follows:

7 I acknowledge that I have accessed and reviewed an electronic
8 copy of the Fair Treatment Process. I have also received
9 information about how to access an electronic copy of the Fair
10 Treatment Process via the Company's intranet. I understand that I
11 may print all or parts of the Fair Treatment Process for my use and
12 I may also receive a hardcopy of the Fair Treatment Process from
13 Human Resources. *Except to the extent that any applicable*
14 *collective bargaining agreement provided otherwise*, I hereby
15 voluntarily agree to use the Company's Fair Treatment Process and
16 to submit to final and binding arbitration of any and all claims and
17 dispute that are related in any way to my employment or the
18 termination of my employment with Conifer. I understand that
19 final and binding arbitration will be the sole and exclusive remedy
20 of any such claim or dispute against Conifer or its parent,
21 subsidiary or affiliated companies or entities, and each of its and/or
22 their employees, officers, directors or agents, and that, by agreeing
23 to the use of arbitration to resolve my dispute, both the Company
24 and I agree to forego any right we each may have had to a jury trial
 on issues covered by the Fair Treatment Process. I also agree that
 such arbitration will be conducted before an experienced arbitrator
 chosen by me and the Company, and will be conducted under the
 Federal Arbitration Act and the procedural rules of the American
 Arbitration Association ("AAA").

19 I further acknowledge that in exchange for my agreement to
20 arbitrate, the Company also agrees to submit all claims and
21 disputes it may have with me to final and binding arbitration, and
22 that the Company further agrees that if I submit a request for
23 binding arbitration, my maximum out-of-pocket expenses for the
24 arbitrator and the administrative cost of the AAA will be an
 amount equal to one day's pay (if I am an exempt employee), eight
 times my hourly rate of pay (if I am a nonexempt employee), a
 mandated cap or the local civil filing fee, whichever amount is the
 least, and that the Company will pay all of the remaining fees and

1 administrative costs of the arbitrator and the AAA. I further
2 acknowledge that this mutual agreement to arbitrate may not be
3 modified or rescinded except in writing by both me and the
4 Company.

5 A copy of the Employee Handbook and the Fair Treatment Process
6 can be found in the Document Library within the New Employee
7 Portal.

8 Dkt. 7-2, at 2.

9 Conifer claims that it requested that Plaintiff stipulate to arbitration, but Plaintiff refused
10 and argued that “(a) the FTP did not have mutual assent because Conifer did not countersign the
11 agreement; and (b) the FTP lacks consideration because it was not signed as a condition of
12 employment.” Dkt. 8, at 1.²

13 Conifer filed the instant Motion requesting that the Court dismiss this case and compel
14 arbitration in accordance with the terms of the FTP. Dkt. 6.

15 Plaintiff filed a response in opposition to the Motion. Dkt. 10. Plaintiff argues that the
16 FTP is substantively and procedurally unconscionable.

17 Conifer filed a reply in support of the Motion. Dkt. 12.

18 **II. DISCUSSION**

19 **A. WASHINGTON STATE SUBSTANTIVE LAW APPLIES**

20 Under the rule of *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), on state law claims,
21 federal courts sitting in diversity jurisdiction apply state substantive law and federal procedural
22 law. *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 427 (1996).

23 ² Although Conifer anticipates these arguments from Plaintiff and discusses them in the Motion, Plaintiff does not
24 discuss or assert these arguments in her response. *See* Dkt. 10.

1 **B. ARBITRATION LEGAL STANDARDS**

2 The Federal Arbitration Act (“FAA”), 9 U.S.C., established a “liberal federal policy
3 favoring arbitration.” *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011). Creating “a
4 body of federal substantive law of arbitrability,” the FAA applies to “any arbitration agreement
5 within the coverage of the Act.” *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460
6 U.S. 1, 24 (1983). The FAA applies to any “written provision in ... a contract evidencing a
7 transaction involving commerce.” 9 U.S.C. § 2. Pursuant to the FAA, arbitration agreements are
8 “valid, irrevocable and enforceable, save upon such grounds as exist at law or in equity for the
9 revocation of any contract.” 9 U.S.C. § 2.

10 “[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of
11 arbitration, whether the problem at hand is the construction of the contract language itself or an
12 allegation of waiver, delay, or a like defense to arbitrability.” *Moses H. Cone Mem’l Hosp.*, 460
13 U.S. at 24–25 (1983). “Courts must indulge every presumption ‘in favor of arbitration, whether
14 the problem at hand is the construction of the contract language itself or an allegation of waiver,
15 delay, or a like defense to arbitrability.’” *Zuver v. Airtouch Commc’ns, Inc.*, 153 Wn.2d 293, 301
16 (2004) (quoting *Moses H. Cone Mem’l Hosp.*, 460 U.S. at 25). “The party opposing arbitration
17 bears the burden of showing that the agreement is not enforceable.” *Id.* at 302.

18 “Because the FAA mandates that ‘district courts *shall* direct the parties to proceed to
19 arbitration on issues as to which an arbitration agreement has been signed[,]’ the FAA limits
20 courts’ involvement to ‘determining (1) whether a valid agreement to arbitrate exists and, if it
21 does, (2) whether the agreement encompasses the dispute at issue.’” *Cox v. Ocean View Hotel*
22 *Corp.*, 533 F.3d 1114, 1119 (9th Cir. 2008) (emphasis in the original) (quoting *Chiron Corp. v.*
23 *Ortho Diagnostic Sys., Inc.*, 207 F.3d 1126, 1130 (9th Cir. 2000)). “If the response is affirmative
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1 on both counts, then the Act requires the court to enforce the arbitration agreement in accordance
2 with its terms.” *Chiron Corp.*, 207 F.3d at 1130. If the court determines the matter is subject to
3 arbitration, it may either stay the matter pending arbitration or dismiss it. *EEOC v. Waffle House,*
4 *Inc.*, 534 U.S. 279, 289 (2002).

5 In assessing whether an arbitration agreement or clause is enforceable, the Court should
6 apply ordinary state-law principles that govern the formation of contracts. *Lowden v. T-Mobile*
7 *USA, Inc.*, 512 F.3d 1213, 1217–18 (9th Cir. 2008).

8 Washington follows the objective manifestation theory of contracts. *Hearst Commc'ns,*
9 *Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 503 (2005). “Under this approach, we attempt to
10 determine the parties' intent by focusing on the objective manifestations of the agreement, rather
11 than on the unexpressed subjective intent of the parties.” *Id.* “We generally give words in a
12 contract their ordinary, usual, and popular meaning unless the entirety of the agreement clearly
13 demonstrates a contrary intent.” *Id.* Contracts are viewed as a whole; particular language is
14 interpreted in the context of other contract provisions. *See Weyerhaeuser Co. v. Commercial*
15 *Union Ins. Co.*, 142 Wn.2d 654, 669–70 (2000).

16 “The proponent of a contract need only prove the existence of the contract and the other
17 party’s manifestation of intent to be bound thereby; the unexpressed subjective intent of either
18 party is irrelevant.” *Retail Clerks Health & Welfare Tr. Funds v. Shopland Supermkt., Inc.*, 96
19 Wn.2d 939, 944 (1982). “In Washington, the intent of the parties to a particular agreement may
20 be discovered not only from the actual language of the agreement, but also from viewing the
21 contract as whole, the subject matter and objective of the contract, all the circumstances
22 surrounding the making of the contract, the subsequent acts and conduct of the parties to the
23 contract, and the reasonableness of respective interpretations advocated by the parties.” *Scott*
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1 *Galvanizing Inc., v. Nw. EnviroServs., Inc.*, 120 Wn.2d 573, 580 (1993) (citations and quotations
2 omitted). A party's signature is evidence that the party intended to be bound. *See Yakima Cty.*
3 *(W. Valley) Fire Prot. Dist. No. 12 v. City of Yakima*, 122 Wn.2d 371, 389 (1993). Once the
4 proponent of a contract meets its burden, the burden shifts to the party seeking to avoid the
5 contract to prove a defense to the contract's enforcement *Id.*; *Retail Clerks Health*, 96 Wn.2d at
6 943.

7 C. ABRITRATION AGREEMENT ANALYSIS

8 Here, pursuant to the FAA, the Court's analysis is limited to "determining (1) whether a
9 valid agreement to arbitrate exists and, if it does, (2) whether the agreement encompasses the
10 dispute at issue." *See Cox*, 533 F.3d at 1119 (9th Cir. 2008).

11 First, the FTP is a valid agreement to arbitrate. *See* Dkt. 7-2 (providing a Handbook and
12 Fair Treatment Process Acknowledgement form signed by Plaintiff); *see also* Dkt. 13 (providing
13 screenshots showing Plaintiff's apparent understanding of and agreement to the FTP prior to
14 accepting employment with Conifer). Second, The FTP agreement encompasses the dispute at
15 issue because Plaintiff's claims of racial discrimination, harassment, and wrongful termination
16 are not excluded from the FTP. *See* Dkt. 7-1, at 5. Therefore, the Court should compel arbitration
17 consistent with the terms of the FTP.

18 Plaintiff's arguments that the FTP is procedurally and substantively unconscionability are
19 without merit. Under Washington law, "generally applicable contract defenses, such as ...
20 unconscionability, may be applied to invalidate arbitration agreements." *Alder v. Fred Lind*
21 *Manor* 153 Wn.2d 331, 342 (2004). Whether a contract is unconscionable is a question of law.
22 *Nelson v. McGoldrick*, 127 Wn.2d 124, 131 (1995). Washington courts recognize two forms of
23 unconscionability: "(1) substantive unconscionability, involving those cases where a clause or
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term in the contract is alleged to be one-sided or overly harsh and (2) procedural unconscionability, relating to impropriety during the process of forming a contract.” *Id.* (quotations omitted). The burden of proving that a contract is unconscionable rests with the party attacking the contract. *Tjart v. Smith Barney, Inc.*, 107 Wn. App. 885, 898 (2001). “Under Washington law, a contract may be invalidated on procedural unconscionability or substantive unconscionability grounds.” *Id.*

1. Procedural Unconscionability

Procedural unconscionability is the lack of meaningful choice, considering all the circumstances surrounding the transaction, including (1) the manner in which the contract was entered, (2) whether each party had a reasonable opportunity to understand the terms of the contract, and (3) whether the important terms were hidden in a maze of fine print. *Zuver v. Airtouch Commc’ns, Inc.*, 153 Wn.2d 293, 303 (2004) (citations and quotations omitted). The Supreme Court of Washington cautioned that “these three factors [should] not be applied mechanically without regard to whether in truth a meaningful choice existed.” *Id.*

Plaintiff argues that the FTP is procedurally unconscionable because it was a shrouded adhesion contract “found in a five-page section of the Defendant’s Employee Handbook.” Dkt. 10. However, it appears that “Conifer created a process to ensure that the arbitration terms and the employee handbook are reviewed and understood.” Dkts. 12, at 2; and 13. Conifer provides screenshots indicating that Plaintiff had opened and reviewed the handbook and understood, among other things, that she agreed “to forego any right [she and Conifer] may have had to a jury trial on issues covered by the Fair Treatment Process.” Dkt. 13, at 3.

It appears that (1) the FTP was not entered into in an unfair manner, (2) each party had a reasonable opportunity to understand the terms of the FTP, and (3), far from being hidden in a

1 maze of fine print, the arbitration agreement terms of the FTP were remarkably transparent and
2 understandable.

3 Therefore, Plaintiff has not shown that the FTP was procedurally unconscionable.

4 2. Substantive Unconscionability

5 “Substantive unconscionability involves those cases where a clause or term in the
6 contract is alleged to be one-sided or overly harsh.” *Luna v. Household Fin. Corp.* III, 236 F.
7 Supp. 2d 1166, 1177 (W.D. Wash. 2002) (citing *McGoldrick*, 127 Wn.2d at 131 (quoting
8 *Schroeder*, 86 Wn.2d at 260, 544 P.2d 20)). “‘Shocking to the conscience,’ ‘monstrously harsh’
9 and ‘exceedingly calloused’ are terms sometimes used to define substantive unconscionability.”
10 *Id.* (quoting *Montgomery Ward & Co. v. Annuity Bd. of S. Baptist Convention*, 16 Wn. App. 439,
11 444 (1976)).

12 Plaintiff contends that the FTP is substantively unconscionable because it (1) contains a
13 confidentiality clause and (2) effectively shortens the statute of limitations for claims. Plaintiff’s
14 arguments are without merit. Dkt. 10.

15 First, a confidentiality clause is not unconscionable per se. *See Zuver*, 153 Wn.2d at 314
16 (“courts have accepted confidentiality provisions in many agreements”). Moreover, the FTP’s
17 confidentiality clause appears flexible, permitting exceptions “on a ‘need to know’ basis or a
18 [sic] permitted or required by law.” Dkt. 7-1, at 6. The FTP’s confidentiality clause does not
19 appear unconscionable.

20 Second, Plaintiff’s contention that the FTP effectively reduces the statute of limitations
21 period for claims is flatly unsupported by the FTP’s terms:

22 Limitations Periods: Any request for arbitration under the FTP
23 must be made within one year after the event giving rise to the
24 dispute. If the claim was submitted to a federal, state or local
agency, then a request for arbitration of that claim must be made

1 within 90 days of the receipt of the agency's decision. *However, if*
2 *a longer limitations period is provided by a statute governing*
3 *the claim, then the claim will be subject to the longer limitations*
4 *period provided by the statute.*

5 Dkt. 7-1, at 6 (emphasis added).

6 Therefore, Plaintiff has not shown that the FTP is substantively unconscionable.

7 3. Conclusion

8 Therefore, for the reasons set forth above, the Court should compel arbitration consistent
9 with the terms of the FTP and stay proceedings in this case. The parties should file a status
10 report, in writing, following completion of arbitration, but no later than October 1, 2020.

11 **III. ORDER**

12 Therefore, it is hereby **ORDERED** that:

- 13 • Defendant Conifer Health Solutions, LLC's Motion to Dismiss and Compel
14 Arbitration (Dkt. 6) is **GRANTED** as follows:
- 15 ○ Plaintiff shall submit her claims to arbitration pursuant to the arbitration
16 agreement;
 - 17 ○ Proceedings in this case are **STAYED** pending completion of arbitration;
18 and
 - 19 ○ The Parties shall file a status report, in writing, following completion of
20 arbitration, but no later than **October 1, 2020**.

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1 The Clerk is directed to send uncertified copies of this Order to all counsel of record and
2 to any party appearing *pro se* at said party's last known address.

3 Dated this 2nd day of April, 2020.

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5 ROBERT J. BRYAN
6 United States District Judge
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